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No. 04-1140

IN THE

Supreme Court of the United States

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,
Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation, and CENTURY NATIONAL INSURANCE CORPORATION, a California Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. RECENT SCHOLARSHIP CONFIRMS THAT ERRONEOUS REMOVALS ARE A SIGNIFICANT AND GROWING PROBLEM.

A forthcoming scholarly article, based on empirical research into litigation trends, finds that erroneous removals are a significant and growing problem. The article is *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. Empirical Legal Stud. __ (forthcoming Nov.

2005) by Theodore Eisenberg and Trevor W. Morrison.[1] Relying on data gathered by the Administrative Office of U.S. Courts, the authors reach a conclusion that they summarize as follows: "[O]ur findings suggest that erroneous removal is a growing phenomenon, and hence an increasingly burdensome deadweight loss for the federal judicial system." *Id.* at ___; *see also id.* at ___ ("With respect to diversity cases in particular, we find a number of trends: the annual number of diversity-based removals has generally increased over the last two decades; the proportion of the federal diversity docket consisting of cases originating in federal court as removals has also increased; and the rate at which removed diversity cases are remanded has risen as well. Taken together, these trends suggest that erroneous removal is a growing phenomenon, and thus exacts a growing toll on the federal judiciary."). That phenomenon sets the backdrop for consideration of this case.

II. SECTION 1447(C) IS A FEE-SHIFTING STATUTE, NOT A PROVISION ALLOWING FEE AWARDS ONLY WHEN THEY ARE AUTHORIZED BY SOME OTHER LAW.

Respondents argue that Section 1447(c)'s language about fees—"An order remanding the case may require payment of . . . attorney fees" . . . is not a fee-shifting statute at all. Instead, say Respondents, fees can be awarded upon remanding a case only when authorized by some *other* law, such as Rule 11 or the established "bad faith" equitable exception to the American Rule. Respondents identify no case finding merit in this argument. The lower courts agree that Section 1447(c) is itself a source of fee-shifting authority. *See, e.g., Bartholemew v. Town of Collierville*, 409 F.3d 684, 686 (6th Cir. 2005) (discussing "the 1988 change [of Section 1447(c)] from a punitive to a fee-shifting statute").

[1] Pursuant to Rule 32.3, Petitioners have written to the Clerk proposing to lodge copies of the cited article in draft form.

Respondents argue that after the 1988 amendment, the relevant provision of Section 1447(c) was still simply what it had been before, when it had referred only to costs and not to fees: an abrogation of a common law rule that a court without subject matter jurisdiction lacked the power to award costs or fees *even if* those costs or fees would have been available under some other law. The fatal problem with this view is that it does not explain why Congress added the language about fees. Prior to the 1988 amendment, courts knew full well that they could award fees upon remanding a case when some source of law other than the remand statute authorized fee-shifting. The most commonly invoked basis for doing so, as seen in our opening brief, was the inherent equitable power to award fees against a party that litigated in bad faith. Courts also knew that they could impose Rule 11 sanctions based on frivolous removals. *See Ballard's Service Center v. Transue*, 865 F.2d 447 (1st Cir. 1989) (affirming order imposing such sanctions prior to 1988 amendment of Section 1447(c)); *Four Keys Leasing & Maintenance v. Simithis*, 849 F.2d 770 (2nd Cir. 1988); *News-Texan, Inc. v. City of Garland*, 814 F.2d 216 (5th Cir. 1987). We have seen no hint that there was any question about the existence of this power.[2] Given the complete lack of evidence of uncertainty about the power to award

[2] Respondents' quotation from the Wright and Miller treatise (Brief at 19) is not evidence of such uncertainty. As the Solicitor General explains, the treatise was calling for an amendment of Section 1447(c) to make it an affirmative source of fee-shifting authority, not suggesting that an amendment was necessary to enable a remanding court to award fees that were authorized under other law. (Brief for United States at 22).

It is likely that courts and Congress, in 1988 and before, understood the existing statutory authorization of "costs" to include fees, where fees were available under some other source of law. This Court had held just that, or at least something quite close to it, in interpreting the word "costs" in the Federal Rules of Civil Procedure in 1985. *Marek v. Chesny*, 473 U.S. 1 (1985). In any event, for reasons stated in the text above there was no reason for Congress to be concerned about the issue in 1988.

fees where authorized under other law, the Congressional addition of the fee language cannot be interpreted as clearing up some non-existent uncertainty on this point.

But the addition of the reference to fees in Section 1447(c) must have meant something; words are not added to statutes for no reason. The only reading that would give meaning to the relevant language is the reading that we, and (so far as we are aware) every court that has looked at the matter, have adopted: that the amendment was itself an authorization for fee-shifting. This reading of Section 1447(c) also has the virtue of being the most natural understanding of the words. Most people, when told that a law provides that a court may award fees in a certain kind of case, certainly would not take this to mean that the court may do so *only* if some *other* law says so as well.[3]

Respondents' other arguments for reading Section 1447(c) as something other than a fee-shifting statute are also wrong. For instance, to read Section 1447(c) as a fee-shifting statute would not "clash with Fed. R. Civ. P. 11 and rules of professional responsibility, and interfere with an attorney's ethical obligation to represent his or her client zealously." (Respondents' Brief at 17 and n.30). Respondents' error is in thinking of a fee-shifting award as a punishment for forbidden actions. To allow fees against incorrectly removing defendants would not depend upon a belief that defendants and their counsel had done something that federal law positively forbids them from doing. Fee-shifting awards are primarily *incentives* and *equitable compensation* rather than *prohibitions and penal-*

[3] Respondents argue that Section 1447(c) should not be read as a fee-shifting statute because it is worded somewhat differently from some other fee-shifting statutes. (Brief at 16). But Respondents overstate the difference. In any event there is no reason to expect—indeed, to demand, as Respondents would—that a fee-shifting provision in this succinct statute about procedure and jurisdiction would be written just the same as a fee-shifting provision in a longer statute creating a new federal cause of action.

ties. A defendant will, even if this Court adopts our view, be free to remove a case on whatever non-frivolous basis it believes to be appropriate. It is just that the defendant will consider the possible cost of a fee award before deciding on that course of action, and that the plaintiff will consider the possible award when reacting to a removal of questionable validity. The wasted costs of the unnecessary procedural skirmish will simply fall on the defendant that caused it, rather than on the innocent plaintiff. Defendants will undertake questionable removals only when removal is, in their own judgment, important enough to justify the risk of a fee award. This no more interferes with an attorney's ethical obligation of zealous representation than does, say, an indisputably valid contractual fee-shifting provision.

Respondents are also wrong in contending that the legislative history promised that there was no change from existing law; the passages they quote (Brief at 15) say no such thing. Moreover, the legislative history is not (as they contend) silent about fee-shifting authority. Even if it had been silent that would not matter; laws should be interpreted to mean what their words say even if no staffer reiterated the point in some committee report. But in fact the legislative history's reference to "ensur[ing] that a substantive basis exists for requiring payment of actual expenses incurred in resisting an improper removal" is naturally read as a reference to fee-shifting authority, particularly given the statutory language making the point explicit. Indeed, the very word "substantive" in that passage demonstrates that the amendment was not, as Respondents claim, simply a procedural point regarding *other* substantive sources of fee-shifting authority.

In the end, Respondents seem to concede that Section 1447(c) is indeed a fee-shifting statute. They say that the statutory reference to fees "also resolved the lower federal courts' discord over the awardability of attorney fees under [Section] 1447(c)'s prior wording." (Brief at 19-20). The

"discord" was that some courts believed that Section 1447(c) was a fee-shifting statute, while others believed it was not. (Brief of Respondents at 20 n. 34). Respondents are right: the addition of the reference to fees must be understood as resolving that question. And it obviously resolved that question in favor of our view; certainly one would not resolve the discord in the opposite way by *adding* a reference to fees.

III. PLAINTIFFS WHO SUCCESSFULLY SEEK REMAND SHOULD USUALLY BE AWARDED FEES, AND THE EXISTENCE OF A REASONABLE ARGUMENT IN FAVOR OF REMOVAL IS NOT A VALID REASON TO DENY FEES.

This brings us back to the question presented: identifying the governing standard. Respondents and the Solicitor General disagree, advocating a multi-factor analysis and the *Christiansburg Garment*[4] standard respectively. Both are wrong in contending that the existence of a reasonable argument in favor of removal weighs strongly or dispositively against a fee award. They incorrectly minimize, or ignore, the points that we made in our opening brief; and they overstate the arguments in favor of their preferred standards.

A. Clues about legislative intent point towards broader availability of fee awards.

The available textual and contextual clues point towards a standard making fees the rule rather than the exception, as we showed in our opening brief. The arguments of Respondents and the Solicitor General to the contrary are incorrect.

1. There was not, despite Respondents' implication (Brief at 10-11) some consensus that costs were to be awarded under the prior version of Section 1447(c) only if the removal was unreasonable or the like. Some district court decisions used a standard of the sort that Respondents advocate. Others imposed costs seemingly as a matter of course upon remanding a case, without any finding that the removal was any worse than merely incorrect.[5] So, the legislative action in 1988 cannot be taken as ratifying any previously-utilized standard. *See Fogerty v. Fantasy*, 510 U.S. 517, 527-32 (1994) (holding that Congress could not be taken to have endorsed a certain standard, because the existing caselaw had not uniformly adopted that standard).

2. The pre-1988 cases that did adopt a *Christiansburg Garment*-like standard for awards of costs are notable in that at least some of them were driven by the statutory word "improvidently." As noted in our opening brief, the 1988 deletion of this word is a good textual clue as to the governing standard for fee-shifting. Some courts before 1988 had interpreted Section 1447(c) to mean that costs should not be awarded unless the removal was "improvident," and took that word to require some level of culpability worse than simply being wrong. It is not useful now to debate whether they were right; it is enough to note that this thinking was not uncommon.[6] Notably, at the same time it added the fee-

[4] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

[5] *See, e.g., Coleman v. North American Van Lines*, 1987 U.S. Dist. LEXIS 6395, *5 (N.D. Ill. 1987); *Cocioppe v. Superior Holsteins, III, Ltd.*, 650 F.Supp. 607, 609 (S.D. Tex. 1986); *Ryan v. Tollefson*, 118 F.Supp. 420, 423 (E.D.N.Y. 1954) (quoting local rule that called for imposition of costs on removing defendant whenever case was not removable or was improperly removed). *See also Bucary v. Rothrock*, 883 F.2d 447, 449 (6th Cir. 1989).

[6] See, *e.g., Gray v. New York Life Ins. Co.*, 906 F.Supp. 628, 630 (N.D. Ala. 1995) ("Prior to the 1988 amendments, attorneys fees to the plaintiff were rarely awarded as part of 'just costs,' which prior to 1988 could be awarded pursuant to § 1447(c) only in the event the removal was deemed 'improvident.'"); *Sage Investors v. Group W Cable*, 666 F.Supp. 186, 189 (D. Ariz. 1986) (denying costs because the "court cannot say that GW's removal action was improvident due to the confusion among the circuits on a limited partner's citizenship for diversity purposes."). Indeed, so ingrained was this notion of "improvidence" as the standard for granting costs, that it persists in some courts to this day. *Lang v. American Electric*

shifting language, Congress deleted that word "improvidently." Respondents and the Solicitor General describe this as a meaningless change. But anyone paying attention to the existing caselaw—such as the Judicial Conference, which proposed the amendment—would have known that the word was driving some courts to use a heightened standard and to deny costs. Had Congress intended a *Christiansburg Garment*-like standard for the award of fees, it surely would not have deleted the word that had impelled many courts towards that very standard.

3. We showed in our opening brief that to read Section 1447(c) as adopting the *Christiansburg Garment* standard would make the fee-shifting provision nugatory, because it would do little or nothing that was not already accomplished by Fed. R. Civ. P. 11. The Solicitor General responds (Brief at 22-24 & nn. 8-10) that the provision when interpreted this way would still not be entirely pointless, because some courts at the time were under the misimpression that Rule 11 sanctions could only be imposed in cases of subjective bad faith. But if we hypothesize with the Solicitor General that this misimpression among a few courts was what Congress was thinking of, surely it would have been more likely that the Congress would have worked to *correct* that misimpression as part of the Judicial Improvements Act, rather than tinkering with it in just this one particular procedural context.[7]

Power Co., 785 F.Supp. 1331, 1335 (N.D. Ind. 1992) (denying costs because the "court cannot find that NECA's removal was in bad faith or improvident."); *Tidwell v. Coldwater Covers, Inc.*, 2005 U.S. Dist. LEXIS 2767, *14-*15 (N.D. Ala. 2005) (denying costs because the "attempt to remove was not improvident and appears to have been arguably reasonable given the conflict among Eleventh Circuit cases on the issue of complete preemption.").

[7] In any event, there is no reason to believe that Congress actually was thinking about this difference in courts' views of Rule 11. The point is only important in that (we think) the existence of Rule 11 shows that reading the statute to incorporate the *Christiansburg Garment* rule would make it pointless. If the Court disagreed, that would merely take away the force of this particular sub-point, but it would not beyond that weigh *against* our interpretation of the statute.

4. Respondents and *amici* point out that the legislative history contains no affirmative indication that the Congress meant to adopt a presumption in favor of fees or the *Piggie Park* rule.[8] But this is not particularly probative. There was, after all, no hint in the Court's opinion in *Piggie Park* itself that there was any comment in the legislative history about what standard should govern the fee-shifting provision. So, affirmative comment in legislative history is demonstrably not, and should not become, a precondition for implementation of the *Piggie Park* rule. The theory of "the dog that did not bark" may perhaps have its place in certain sorts of cases, such as where the legislative history on the particular provision is extensive yet there is nothing to support the contention under review, or where (as in *Fogerty*[9]) the contention is that Congress did something quite odd or quite extraordinary without mentioning it. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. ___, ____, 125 S.Ct. 1453, 1465 (2005) (Stevens, J., concurring in the judgment). But where those conditions are absent, as here, the "dog that did not bark" theory has little probative value. Even the presence of statements in legislative history is useful only insofar as it provides a "reliable" guide to the interpretation of ambiguous language. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. ___, 125 S. Ct. 2611, 2626 (2005). The absence of statements to support a given contention is "reliable," if ever, only under special circumstances like those just mentioned. This case, however, involves nothing odd or extraordinary, but merely the adoption in yet one more context of a rather

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[8] *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

[9] *Fogerty*, 510 U.S. at 533-34 (relying on the absence of legislative history to refute the contention that the Congress had adopted the "British Rule," which is extraordinarily rare in American law).

common fee-shifting standard. There is no reason to require Congress to say this in the legislative history, if the other available indicia of meaning point in that direction.

5. Finally, as we noted in our opening brief, the asymmetrical nature of Section 1447(c)'s fee-shifting authority is itself indication that the point was to deter removals—not to encourage them, nor even to deter plaintiffs and defendants alike from making unreasonable arguments for or against them. Indeed it is more important to deter wrongful removals than to deter plaintiffs from incorrectly invoking federal jurisdiction; this is reflected in the fact that, while Section 1447(c) allows for fee awards, 28 U.S.C. § 1919 (allowing awards of costs but not fees upon dismissal for lack of jurisdiction) does not. These facts demonstrate that opposition to incorrect removals serves important federal interests, and that incorrect removals undermine federal interests. As seen in our opening brief, the federal interests at stake include maintaining the proper balance between state and federal spheres of authority; maintaining the proper balance between legislative and judicial authority over the boundaries of jurisdiction; avoiding waste of resources in litigation over jurisdictional issues (and, even worse, horrible waste when district courts wrongly assert jurisdiction over incorrectly removed cases); preserving the right of plaintiffs to choose the forum except where that right is limited by statute; and avoiding unnecessary disruption of the progress of litigation in state courts.

B. The large objectives at stake in the law of removal and remand support our view.

Even with what we have said thus far, our case does not wholly depend on a belief that Congress, or even the Judicial Conference, actually pondered (much less intended to answer) the question of what standard would apply.[10] It is

[10] Legislatures sometimes use vague words intentionally, to avoid having to work through disagreement about specifics; words like "may" can be legislatively useful precisely because they avoid having to ponder or reach agreement about such things. That does not stop this Court from interpreting the laws.

enough to note that Congress used the word—"may"—that invokes this Court's ability to formulate an appropriate standard, just as this Court has done for other statutes before and since. Even when this Court has set forth categorical rules to govern fee-shifting in other contexts, the Court has not required itself to suppose that Congress actually thought collectively about the issue. There was no reason to think, for instance, that Congress had actually formed a collective opinion about the circumstances under which intervenors would be liable for fees in Title VII cases; that did not stop this Court from finding an appropriate standard in *Indep. Fed. of Flight Attendants v. Zipes*, 491 U.S. 754 (1989). So it is here. As we demonstrated in our opening brief, the relevant large objectives and equitable considerations lead to a fee-shifting standard that would deter questionable removals, would encourage plaintiffs to identify and challenge them, and would equitably shift the costs of these wasteful procedural excursions to the defendants who cause them.

Respondents and their *amici*, however, argue that removal of cases is a positive good that federal law encourages, and therefore that a fee-shifting standard that would deter questionable removals is contrary to the law's "large objectives." This is, in the end, the core of their argument. They ignore the fact that, even aside from its impact on defendants' behavior, our fee-shifting standard would give plaintiffs' counsel a greater incentive to spot and litigate questionable removals, and to litigate them well. This in itself would be an important benefit, as it would reduce the number of disastrous cases in which a jurisdictional defect is spotted only after years of litigation (sometimes even only on appeal). They also ignore the equitable consideration that the cost of a pointless procedural detour ought, in fairness, to fall on the

party who was wrong rather than the one who was right. But even aside from that, Respondents and their *amici* are wrong in suggesting that routine awards of fees would, by deterring questionable removals, disserve some federal interest.

It is certainly true that the option of removal is given by statute, and therefore in a tautological sense one could say that *conferring the option* serves some interests that federal law recognizes as valid; it must, or else the removal statutes would not have been enacted. But this does *not* mean that exercise of the option is an affirmative good—much less that exercise of the option is an affirmative good when the validity of the removal is questionable. There is no public goal of encouraging *any* removals, much less of encouraging removals of questionable validity.

Take diversity cases first. If, tomorrow, half of all defendants stopped removing diversity cases (whether by carelessly missing the deadlines, or because of a preference for state courts, or pursuant to forum-selection contracts waiving the option, or what have you), there would be no detrimental effect on anyone. And if—as Respondents postulate would be the effect of the rule we advocate—only those with "obviously" removable cases tried to remove, again there would be no detrimental effect or undermining of any federal interest. There simply is no federal interest served by the removal of diversity cases; true, the *option* is given for a reason, but the exercise of the option helps no one but the defendant. So, if defendants avoided removing diversity cases because they did not want to risk the imposition of fees, that too would impair no federal interest.

The same is true as to cases removed under federal-question jurisdiction. As with diversity, defendants can give away, contract away, choose not to exercise, or lose through negligence their option of removing federal question cases; and one defendant who prefers state court can keep all other defendants from removing. There cannot be much of a federal interest served by removals even of the "obviously" removable federal-question cases, much less of the ones of questionable removability, if the option is so easily lost or foregone. And certainly there is no real federal interest that would be undermined if, suddenly, all defendants chose only to remove those federal-question cases that were "obviously" removable. The relatively rare sorts of cases in which federal-question jurisdiction is available but not obviously so are, still, equally well suited to being litigated in state court. State courts are perfectly competent to handle federal questions. *San Remo Hotel, L.P. v. San Francisco*, 545 U.S. ___, 125 S.Ct. 2491, 2507 (2005); *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 823 (1990).[11]

Respondents and their *amici* respond that questionable removals can be good in that they help to define the boundaries of federal subject-matter jurisdiction. But (aside from the circularity of the contention) our proposed fee-shifting standard would not interfere with clarity in that regard. First, Congress can clarify or change the boundaries at will, within constitutional limits, as it recently did with regard to class actions.[12] Second, nearly all the same sorts of jurisdictional

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[11] Congress only very rarely prefers that federal-question cases be heard in federal court rather than state court; causes of action within exclusive federal jurisdiction are the exception rather than the rule. But even as to cases arising under such statutes, the right of removal is limited by timeliness and other procedural requirements. There is no reason to encourage aggressive advocacy that wrongly attempts to expand the scope of removal jurisdiction, even when it is based on arguments about exclusive federal jurisdiction. Perhaps there are some few cases in which a defendant makes a particularly good but narrowly unsuccessful argument for removal based on a statute that provides for exclusive federal jurisdiction. At most, some such cases might represent an *exception* to the rule in favor of fees when a case is remanded, if the wrong removal actually served some legitimate federal interest other than the defendant's own self-interest. That relatively rare sort of hypothetical case, however, is no reason to reject our proposed rule altogether.

[12] "Class Action Fairness Act," Pub. L. 109-2, 119 Stat. 4 (2005).

questions can be raised and litigated in cases filed in federal courts in the first instance; there will be plenty of chances for the appellate courts to rule on novel jurisdictional questions, to the extent necessary, even if fewer cases are removed. Take, for instance, the argument of Respondents and their *amici* that the questionable but ultimately correct removal in *Grable & Sons Metal Products, Inc. v. Darue Eng. & Mfg.*, 545 U.S. ___, 125 S.Ct. 2363 (2005) allowed this Court to settle an important question on which the Circuits were split. But questionable removals were not necessary for resolution of the question; this Court's opinion shows that at least one of the decisions exemplifying the split was not a removed case but a case filed in federal court in the first place. *Id.*, 125 S.Ct. at 2366 n.2, *citing Ormet Corp. v. Ohio Power Company*, 98 F.3d 799 (4th Cir. 1996). Indeed, even issues of "complete preemption," which one might think at first blush could only be resolved by removal, can be argued in cases that remain in state court and can come to this Court through that route. A defendant who believes that a state law claim is "completely preempted" can either remove with some risk of a fee award, or stay in state court yet still contend that the state law claim is displaced by a federal cause of action. This Court could, if the issue were important, decide the issue on a case arising from the state courts; and this would resolve the removability issue for future cases.

In short, if only the "obviously" removable cases were removed, that would be to no one's detriment. But we are not asking for a prohibition against removal of cases that are not "obviously" removable. We are asking merely for a rule that would make defendants think a bit harder before undertaking a questionable removal. This ought to make defendants reserve questionable removals only for those cases in which their arguments have a high likelihood of success, and in which their preference for federal court is strong enough and the case important enough to justify the risk of a fee award. And if there are some few exceptional cases that present a

different face, where there is a particular reason to spare a defendant the consequences of its wrongful removal, the *Piggie Park* rule that we are advocating does allow for exception in unusual cases.

C. The proper limits of removal jurisdiction are contested matters of politics and policy; those limits are to be changed, if at all, through legislation rather than through aggressive advocacy of novel theories.

Amicus Product Liability Advisory Counsel, with visions of mass-tort lawyers run amok, urges that defendants must be given free rein to think creatively about removal, in order to "evolve" the boundaries of removal jurisdiction. (Brief at 8). PLAC's heated rhetoric (including its constant mischaracterization of fee awards under Section 1447(c) as "sanctions," Brief at 2, 3, 7, 13, 19, as well as its demonization of its adversaries) merely serves to underscore the fact that the boundaries of removal jurisdiction are a subject of heated debate as a matter of politics and policy. These debates implicate not only conflicts between the interests of those who are usually plaintiffs and those who are usually defendants, but also conflicts about federalism and the proper division of labor between state and federal courts. Efforts to expand the boundaries, such as those that PLAC describes in its brief, should be left for the political sphere. Litigants should not be encouraged to make those political debates into judicial ones.

The statutory boundaries of removal jurisdiction are not supposed to "evolve" by a common-law process. The boundaries are statutory, and changes in them are best made by statute. "[T]he judicial power of the United States . . . is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with juris-

diction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992), *quoting Cary v. Curtis*, 44 U.S. 236 (1845).

Despite this, removing defendants often try to change the law of jurisdiction without legislative action. To take one example, defendants spent untold houfs in innumerable cases over the last decade or so—and caused plaintiffs' lawyers to spent untold hours as well—trying to "evolve" the law towards the notion that punitive damages could be aggregated in class actions to meet the amount-in-controversy requirement. This case was one example. Even after years of those battles, the law still did not allow such aggregation. But at the same time, PLAC's members and others were trying also to win the battle where it should have been fought exclusively: in the halls of Congress. For years their arguments were heard and rejected in the legislative sphere, until just this year they finally found success through the democratic process in the "Class Action Fairness Act." There is no reason why courts should change the removal laws on this sort of point when the legislature and executive are not yet willing to do so. Indeed, Congress has known for decades of this Court's principle that removal statutes are strictly construed,[13] and Congress could even have abrogated that principle had it wanted courts to take a more active common-law approach to questions of jurisdiction. It has not.

Similarly, PLAC errs in arguing that defendants are justified in making questionable assertions of "fraudulent joinder" on the grounds that some plaintiffs' lawyers are too crafty. Our view of fraudulent joinder, contrary to PLAC's, is that some defendants too often abuse the concept and some courts have been too forgiving of the abuses. There is room for

[13] *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100, 109 (1941).

debate on the point, a debate that could feature anecdotes on each side;[14] this case is not the proper forum for such an inherently political debate on a side issue. Again, the defense community recently won a significant part of the relevant battle in the legislative sphere, through modification of the "complete diversity" rule for some cases; that is where the battle should primarily be fought. And again our proposal would not forbid defendants from making "fraudulent joinder" arguments; it would merely induce them to reserve such arguments for the cases where they have a significant likelihood of success and where the stakes are high enough to justify the risk of a fee award in the event that removal fails.

Contrary to the arguments of Respondents and their *amici*, the boundaries of removal jurisdiction are not among the issues in which the ordinary give-and-take of creatively aggressive advocacy is to be encouraged. Removal jurisdiction is different from ordinary litigation skirmishes, for all the reasons we have shown; removal is not just another weapon in a furious litigator's arsenal. That is precisely why Section 1447(c) allows fee-shifting for incorrect removals without any stated requirement of culpability beyond the mere fact of remand. This Court likewise should impose no further requirement.

IV. PETITIONERS SHOULD RECEIVE A FEE AWARD.

If the Court adopts the standard that we have proposed, then fees should be awarded; Respondents do not dispute the point. (Brief at 43). If on the other hand the Court agrees with the Solicitor General that the *Christiansburg Garment* standard applies, then we do not expect that the denial of fees would be reversed; a removal that is sufficient to convince a

[14] *See, e.g., Tillman v. R. J. Reynolds Tobacco*, 340 F.3d 1277 (11th Cir. 2003).

District Judge would, in all likelihood, not be found by a higher court to be completely lacking in any reasonable basis.

If the Court adopts a looser multi-factored standard, the outcome of the case will primarily depend on how that standard treats the existence of a reasonable argument in favor of the removal. If (as Respondents urge) that is the most important factor and one that weighs heavily against a fee award, then that would likely lead to an affirmance in this case, for reasons like those mentioned just above.

Finally, the Court might adopt a multi-factored standard under which the existence of a reasonable argument in favor of removal is *not* a good reason to deny fees, as we urged as an alternative in our opening brief at page 33. In that event, a fee award would be appropriate here. Other than the existence of a reasonable basis for their removal, Respondents offer only two things weighing (in their view) against a fee award: the fact that Petitioners waited until a year after removal before raising the issue of jurisdiction, and (in Respondents' words) the "complaint's unclear allegations regarding the amounts in controversy and [Petitioners'] feigned ignorance of the falsity of their allegation that they had paid the collateral protection insurance premium." (Brief of Respondents at 43). But none of this is a good reason for denying fees.

The lapse of time between removal and motion for remand is at most relevant to how *much* should be awarded in fees; it might have some impact on what federal-court time is compensable other than the work on the remand question itself. But the question of how to arrive at the appropriate (or, in the word of the statute, "just") amount of fees is not before the Court. And the lapse of time is itself proof that Petitioners' pleadings were no improper scheme to avoid removal, or anything of the sort; had there been such a scheme the motion to remand would have been immediate. Furthermore, the reason Petitioners' complaint did not set out a precise amount

of damages is that there was no requirement that a state court complaint had to contain such a thing; again it is plain that there was no scheme to avoid removal. Therefore this cannot be counted as something weighing against Petitioners. As to the issue of the collateral protection insurance premiums, the only relevance to the removal issue is that Respondents included *all* of those premiums in their amount-in-controversy calculation even though the Complaint made it clear (JA20, ¶ 30) that Petitioners had not paid the full amount. The Court of Appeals recognized that this was *Respondents'* error, a failure on *their* part to demonstrate the requisite amount in controversy. *Martin v. Franklin Capital*, 251 F.3d 1284, 1291 & n.5 (10th Cir. 2001), JA 59. Respondents cannot shift the blame to Petitioners.

In short, Respondents have offered nothing, other than the contention that there was a reasonable basis for the removal, that weighs to any degree against an award of fees. Weighing in favor of such an award, under a multi-factor analysis, would be that the removal was legally incorrect; that it was a disfavored attempt to greatly expand the boundaries of federal removal jurisdiction; that Respondents' error has caused the expenditure of a great amount of public and private resources; and that Respondents' resources exceed those of their customers.

CONCLUSION

The judgment of the Court of Appeals should be reversed. The case should be remanded with instructions to award Petitioners their fees and expenses, or for further proceedings under such standard as the Court adopts.

Respectfully submitted,

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